JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1346

CAYUGA ROCK SALT COMPANY, CHAS. SCHAEFER SONS, INC., WINANS CARTER CORP., WINANS RELIANCE CORP. and C. G. WINANS COMPANY,

Petitioners,

v.

STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners

v.

STATE OF NEW JERSEY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Cayuga Rock Salt Company, Chas. Schaefer Sons, Inc., Winans Carter Corp., Winans Reliance Corp., and C. G. Winans Company, Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 22, 1968.

REPORTS OF THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 387 F. 2d 94 (3d Cir. 1967). It is appended to this petition at pages A-1 to A-9. The opinion of the District Court for the District of New Jersey is unreported and is appended to this petition at pages A-10 to A-55.

JURISDICTION.

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit reversing the judgments of the United States District Court for the District of New Jersey were filed on December 8, 1967. Rehearing was denied on January 22, 1968.

The Jurisdiction of this Court is invoked pursuant to the provisions of the Act of June 25, 1948, 28 U. S. C. § 1254.

QUESTION PRESENTED.

May the tolling provision of Section 5 (b) of the Clayton Act be invoked against defendants to bar the defense of the Statute of Limitations where such defendants were neither named as defendants nor as co-conspirators in the prior government antitrust proceeding against other sellers found to be engaged in a limited regional conspiracy in markets where the present defendants do not engage in business?

STATUTES INVOLVED.

The statutes involved are § 4(b) of the Clayton Act, c. 283, § 1, 69 Stat. 283, 15 U. S. C. § 15(b):

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revised by said sections."

and § 5(b) of the Clayton Act, c. 283, § 2, 69 Stat. 283, 15 U. S. C. § 16(b):

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including any action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension of within four years after the cause of action accrued."

BASIS FOR FEDERAL JURISDICTION.

Federal jurisdiction over this case is based upon the Sherman Act, Sections 1 and 2, July 2, 1890, c. 647, 26 Stat. 207, 210, 15 U. S. C. §§ 1, 2.

STATEMENT OF THE CASE.

Petitioners seek review of the judgment of the United States Court of Appeals for the Third Circuit which denied them the defense of the four year statute of limitations of the Clayton Act because of the pendency of a prior government action with which petitioners were not even remotely connected.

The first complaint in this case was filed on June 28, 1965 by the State of New Jersey on its own behalf and as a representative of an alleged class. This complaint, which was never served upon instructions from plaintiffs' counsel, averred violations of the Sherman Act and was brought against petitioner, Cayuga Rock Salt Company, and against three other producers of rock salt: Morton Salt Company, International Salt Company and Diamond Crystal Salt Company.[1] The latter three salt producers had been named as parties in prior government antitrust proceedings in Minneapolis, Minnesota, but the petitioner, Cayuga Rock Salt Company, was not named nor in any way involved in that prior proceeding (189a).

An amended complaint in this case was subsequently filed on October 25, 1965, adding petitioners, Charles Schaefer Sons, Inc., Winans Carter Corp. and Winans Reliance Corp., local distributors of rock salt in New Jersey, as defendants in addition to those named in the original Complaint (21a-27a). Like petitioner, Cayuga Rock Salt Company, these latter petitioners were neither named as defendants or co-conspirators, nor in any way involved in the Minnesota proceedings brought by the government.

1. Local Philadelphia distributors of rock salt, Salt Service Incorporated and Pioneer Salt Company were named as defendants, but subsequently were dropped as parties upon the filing of the amended complaint on October 25, 1965.

The first government action was a criminal indictment returned against the other three salt producers in the District of Minnesota (No. 4-61 Cr. 65) on June 28, 1961. Thereafter, a companion civil proceeding was filed by the United States on July 11, 1961 (No. 4-61 Civ. 162) (143a). The jury trial in the criminal case commenced May 2, 1962 against Morton, Diamond Crystal and International Salt Companies and was concluded on June 7, 1962, resulting in acquittals for the three salt producers. A judgment was entered in the civil suit against Morton Salt Company and Diamond Crystal Salt Company[2] on November 24, 1963, following trial without jury. *United States v. Morton Salt Company,* 1964 CCH Trade Cases ¶ 71,304.

The record and the exhibits in both the criminal and civil actions in Minneapolis make no mention of any of the petitioners. No officer or representative of any of the petitioners appeared as a witness in those proceedings. None of the petitioners received notice of the pendency of the government proceedings. The opinion of the Court in the civil action makes no mention of any of the petitioners. *United States v. Morton Salt Company, supra.* No finding of a national conspiracy was made in the government civil case in which only a limited six state midwest regional conspiracy was found to exist. *United States v. Morton Salt Company, supra.* None of the petitioners is engaged in business in the midwest (29a, 31a, 42a). Subsequently, the judgment as to Morton Salt Company and Diamond Crystal Salt Company in the Government civil action was affirmed by this Court on October 25, 1965. *Morton Salt Company v. U. S.,* 382 U. S. 44 (1965).

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2. International Salt Company did not litigate the civil action, having stipulated to a Consent Decree which was filed on September 20, 1963 and which was signed by Judge Nordbye on November 4, 1963.

In the instant case, the District Court granted petitioners' motions for partial summary judgments by limiting the plaintiffs' claims for damages under the federal antitrust laws to the four year period commencing June 28, 1961 through June 28, 1965, holding that the statute of limitations protected petitioners who were not involved in the prior government action against middle western producers and distributors.

Upon interlocutory appeal, the United States Court of Appeals for the Third Circuit acknowledged the unfairness of tolling the statute of limitations as to the petitioners and found that petitioners' argument has a "certain appeal." Nevertheless, the Court rejected the District Court's position which was supported by overwhelming precedent, and reversed the partial summary judgments in favor of petitioners solely upon its interpretation of Congressional policy. It is this judgment of the Court of Appeals for the Third Circuit that is sought to be reviewed by a Writ of Certiorari.

REASONS FOR ALLOWANCE OF THE WRIT.

The decision of the United States Court of Appeals for the Third Circuit in the present case has determined a crucial and far reaching issue in the area of private antitrust law in direct conflict with decisions of the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the Seventh Circuit. The present decision also conflicts with numerous District Court decisions, the rule of which has been expressly approved in the Congressional history of the tolling provision presently under consideration. The present decision was stated to be based upon broad policy considerations enunciated in two recent decisions of this Court, which dealt with inapposite factual situations, and upon the unappealed portion of a single District Court opinion.

1. The Conflict With Other Circuits.

Both *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F. 2d 284 (7th Cir. 1954) and *Momand v. Universal Film Exchanges*, 172 F. 2d 37 (1st Cir. 1948), *cert. denied*, 336 U. S. 967 (1949), squarely held that the statute suspending the running of limitations during the pendency of a government action to enforce the antitrust laws has no application to one not a party to such government action. Similar holdings appear in *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 176 F. Supp. 527 (D. Minn. 1959), aff'd 289 F. 2d 418 (8th Cir. 1961); *Court Degraw Theatre, Inc. v. Loew's Inc.*, 172 F. Supp. 198 (E. D. N. Y. 1959); *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 154 F. Supp. 216 (D. Minn. 1957); *Samuel Goldwyn Productions, Inc. v. Fox West Coast Theatres Corp.*, 146 F. Supp. 905 (N. D. Cal. 1956); *Leonia Amusement Corp. v. Loew's Inc.*, 117 F.

Supp. 747 (S. D. N. Y. 1953); *Electric Theater Co. v. Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937 (W. D. Mo. 1953); *Levy v. Paramount Pictures, Inc.*, 104 F. Supp. 787 (N. D. Cal. 1952); *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446 (D. Utah 1950). However, the Court of Appeals for the Third Circuit in the instant case has determined that these decisions are no longer authoritative because of certain language in this Court's recent opinions in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 311 (1965) and *Leh v. General Petroleum Corp.*, 382 U. S. 54 (1965), and has instead chosen to rely upon the isolated holding in *State of Michigan v. Morton Salt Co.*, 259 F. Supp. 35 (D. Minn. 1966).[3]

The Court of Appeals' reliance upon certain statements of this Court in *Minnesota Mining* and *Leh, supra,* is completely unwarranted because those statements must be read in the light of the fact that both cases involved defendants who had been named as parties in a government action. Neither case dealt with the applicability of the tolling provisions to non-government defendants as the present petitioners. In *Minnesota Mining, supra,* there was no tolling as to the Essex Wire Company which, like petitioners, was not a party to the government proceedings. This was specifically noted in the subsequent *Leh* opinion:

> "Essex was not a party to the interlocutory appeal in the private action *and no contention was made here that the differences in parties prevented tolling of limitations as to Minnesota Mining.*" (382 U. S. at 63) (Emphasis added.)

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3. It is significant, however, that there were no defendants in the position of the present petitioners on appeal from that decision, so that the present issue was not raised in the Appellate Court. In fact, the Court of Appeals for the Seventh Circuit expressly limited its holding to named co-conspirators. See *Hardy Salt Co. v. State of Illinois*, 377 F. 2d 768, 775 (8th Cir. 1967), cert. denied, 389 U. S. 912 (1967).

Similarly, in the *Leh* case itself, the tolling provision was not applied by this Court to a non-government defendant (382 U. S. at 61):

> "The defendants were the same as those in the government proceeding, except that Shell Oil Company and the Conservation Committee of California Oil Producers were named as defendants in the government suit and were not defendants here, and Olympic Oil Company was named as a defendant here and was not a defendant in the government proceeding.[4]
>
> * * *

4. Olympic was dismissed from the case prior to the ruling on defendants' statute of limitations defense."
(Footnote by the Court)

As this Court so aptly noted in *Armour & Co. v. Wantock*, 323 U. S. 126, 133 (1944):

> "General expressions transposed to other facts are often misleading."

It is submitted that an issue of such grave importance to antitrust law should be finally settled by this Court, and that the scope of this Court's decisions in *Minnesota Mining* and *Leh*, in the context of the different circumstances presented by this case, should be expressly defined by allowing this petition for certiorari and ultimately resolving the applicability of the tolling provision of the Clayton Act.

2. Need for Judicial Clarification to Effectuate Congressional Policy.

The Court of Appeals relied heavily upon its own interpretation of Congressional history and the policy of implementing private antitrust litigation to gain a "feel" for the issue presented. However, the Court of Appeals

ignored explicit expressions of Congressional policy found in the history of the 1955 amendments to the tolling provision. The House Committee Report (H. R. Rep. No. 422, 84th Cong. 1st Sess. 9 (1955)) contained a detailed analysis of *Christiansen v. Paramount Pictures, Inc., supra,* where the Court refused to toll the Statute of Limitations with respect to a private treble damage defendant who was not a defendant in the government litigation. Similarly, the Report of the Senate Committee on the Judiciary stated that:

> "The Committee believes the provision of this bill [tolling provision] will tend to *shorten* the period over which private treble damage actions will extend by requiring that the plaintiff bring his suit within four years after it accrued or within one year after the Government's case has been concluded." (S. Rep. No. 619, 84th Cong. 1st Sess. 6 (1955).) (Emphasis added.)

The Committee also indicated that "it [did] not believe that undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws." *Ibid.*

It is submitted that the decision of the Court of Appeals in this case not only is unsupported by the Legislative history upon which it purports to justify its result, but also enlarges the period which Congress expressly intended to shorten. For this reason alone, a writ of certiorari should be allowed by this Court to clarify an important point of antitrust law.

Finally, the Court of Appeals has acknowledged that there is some degree of unfairness in applying the tolling provisions to petitioners and that the claims raised against them may be stale. The record is clear that petitioners

were not named as defendants or co-conspirators in the government action; were not notified of the action; were not witnesses at any stage of the proceedings; and had no reason to prepare for the defense of this case. It is also undisputed that the government litigation resulted in a finding of only a limited six state conspiracy in the Midwest. But the Court of Appeals considers that petitioners are adequately protected since the tolling provisions will only be effective if it develops that there is a "substantial identity" between the government action and this case. However, the assumption by the Court of Appeals of the possibility of such a development subjects petitioners to a protracted trial on the merits to reach the issue of identity, requiring the proof and defense of stale claims.

Whether or not "substantial identity" is an appropriate test as to "parties" and "co-conspirators," it is clear that such test is inappropriate under the present circumstances where identity cannot be present in that the petitioners had no connection with the earlier action or any claims asserted therein.

CONCLUSION.

For all of the foregoing reasons, petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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